No. 12,150

IN THE

United States Court of Appeals

For the Ninth Circuit

CALIFORNIA ASSOCIATION OF EMPLOYERS (a California corporation), doing business under the firm name and style of Reno Employers Council,

Appellant,

vs.

BUILDING AND CONSTRUCTION TRADES COUNCIL OF RENO, NEVADA AND VICINITY, ET AL., and NATIONAL LABOR RELATIONS BOARD,

Appellees.

BRIEF FOR APPELLEES BUILDING AND CONSTRUCTION TRADES COUNCIL OF RENO, NEVADA, AND VICINITY, ET AL.

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BRIEF FOR APPELLEES BUILDING AND CONSTRUCTION TRADES COUNCIL OF RENO, NEVADA, AND VICINITY, ET AL.

STATEMENT AS TO JURISDICTION.

Appellant prosecutes this appeal from an Order of the District Court dismissing its complaint for a declaratory judgment and preliminary injunction.

This Court has jurisdiction of the appeal by virtue of Section 128 of the Judicial Code, 28 U.S.C.A., Section 225.

INTRODUCTION.

This brief is filed on behalf of the defendant Building and Construction Trades Council of Reno and Vicinity and on behalf of Hod Carriers Building and Common Laborers Local Union No. 169, United Brotherhood of Carpenters and Joiners of America, Local Union No. 971, Operative Plasterers and Cement Finishers Local Union Number 241, Bridge Structural and Ornamental Iron Workers Local Union Number 118 of Sacramento, California, Electrical Workers Local Union Number 401, Painters, Decorators and Paperhangers Local Union Number 567, and Boiler Makers, Iron Ship Builders and Helpers Local Union Number 94, Bricklayers, Masons and Plasterers Local Union Number 6, Journeymen Plumbers and Steam Fitters Local Union Number 350, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Union Number 224, Sheet Metal Workers International Association Local Union Number 26, Elevator Constructors Local Union Number 401, Wood, Wire and Metal Lathers Local Union Number 208, Blacksmiths, Drop Forgers and Helpers Local Union Number 158, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Number 533, and insofar as it has to do solely with the question of the District Court's lack of jurisdiction, Local Union of Operating Engineers No. 3, which appeared solely for the purpose of challenging the jurisdiction of the District Court.

FACTUAL ERRORS CONTAINED IN APPELLANT'S "STATEMENT AS TO JURISDICTION."

Appellant states:

> "California Association of Employers * * * filed its complaint against Building and Construction Trades Council of Reno, Nevada and Vicinity, and various local affiliates of said Council working under a master agreement with the various members of Appellant (R. p. 2) in the United States District Court for the District of Nevada." (App. Br. 1-2.)

This is neither an accurate nor correct statement of the facts. The petition on its face shows that attached to it and made a part of it is the alleged "master agreement". (R. 18-30.)

The agreement recites:

> "This Agreement made and entered into by and between the Reno Employers Council for and on behalf of the *General Contractors, Sub-Contractors, who have signified their approval thereof by the attached authorization attached hereto,* and hereinafter referred to as the Employer and the Building and Construction Trades Council of Reno, Nevada, and vicinity, and its various affiliates for the counties of Washoe, Storey, Ormsby, Lyon, Douglas, Mineral, Churchill, Esmeralda, Nye, Lander, Pershing, Humboldt, Elko, White Pine and Eureka Counties, all affiliated with the American Federation of Labor, who except (the word 'accept' intended) for themselves, and for their various crafts councils and for their various local Unions, which have jurisdiction over the work in the territory hereinabove described, hereinafter referred to as the Union.

> *"Each local Union authorizing the acceptance of this agreement does so by attaching a stipulation to that effect, signed by its duly elected officers, which will be attached hereto, and becomes a part hereof."* (R. 18-19.) (Italics ours.)

The "Master Agreement" is therefore binding only upon the following:

1. Employers General Contractors, Sub-Contractors who have signified their approval thereof by authorizations attached thereto.

2. Local Unions authorizing the acceptance of this agreement * * * by attaching a stipulation to that effect, signed by its duly elected officers which will be attached thereto, and become a part thereof.

There is no allegation that any employer authorization was ever attached to the "Master Agreement" (R. 2-44) and the complaint on its face establishes that the only Local Union Stipulations ever attached to the "Master Agreement" were those of Hod Carriers Building and Common Laborers Local Union No. 169, Painters, Decorators and Paperhangers Local Union Number 567, Plumbers and Steam Fitters Union Local 350, United Slate, Tile and Composition Roofers, Damp and Waterproof Association Local No. 224 and United Brotherhood of Carpenters and Joiners of America Local Union 971. (R. 30-35.)

In other words the Employer Association and the Council negotiated a form of agreement which their members individually could accept or reject. All of the members of the Employers Association rejected

the form of agreement and only five (5) of the sixteen (16) alleged local affiliates of the Council accepted it.

It is obvious, therefore, that what is involved in this proceeding so far as the "Master Agreement" is concerned is not an agreement or contract but the contents of a form of agreement or contract which the petitioning appellant Employer Association desired to recommend to its members, none of whom accepted the form agreement drafted in 1947.

The fact that the individual members of the Employer Association reserved the right to independently and individually determine whether they would or would not become parties to or be bound by the agreement is of vital importance when we come to consider the problem of "Appropriate Unit" under the Labor Management Relations Act, 1947.

For example the National Labor Relations Board in *Costeel Distributing Company,* 76 N.L.R.B. 153 (1948), 21 L.R.M. 162, held that where the employers concerned have not delegated to any joint body the authority to bargain collectively a multi-employers unit is not appropriate.

FACTUAL ERRORS CONTAINED IN APPELLANT'S "STATEMENT OF THE CASE".

Appellant states:

> "On May 24, 1947, appellant, representing some 94 business concerns engaged in the build-

ing and construction industry in the western part of Nevada, and in the eastern part of the State of California, entered into a master contract containing provisions for wages, hours, and terms of employment with the Building and Construction Trades Council of Reno, Nevada, and vicinity. The latter represented 17 American Federation of Labor Unions whose members were employed in said industry. The agreement, by its terms, was to be effective from May 24, 1947, to and including May 21, 1948 (R. p. 4.)." (App. Br. 3.)

The essential factual errors contained in the paragraph last above set out have already been pointed out. We will not burden the Court by repeating them here.

In addition to the foregoing, the Statement of the Case errs by omission:

1. There is no allegation in the complaint:

   (a) That the Council had been certified to represent all crafts, or,

   (b) That any local union had been certified to represent its craft.

2. The affidavits submitted in opposition to the order to show cause and in support of the motions to dismiss, which affidavits are uncontradicted and therefore must be accepted as true, show:

   (a) That as of September 3, 1948, thirteen (13) days prior to the hearing on the motion to dismiss, the alleged Master Agreement attached to the complaint as Exhibit "A":

(1) has been and is of no force and effect, that none of the defendant unions individually, or as a group are employed under or by virtue of said alleged contract;

(2) That both the *employer* and employees have cancelled said contract;

(3) That by its own terms the alleged contract has terminated.

(b) That new and different contracts, not before the Court, have been entered into by the said Local Unions:

(1) That each said new contract for each said local union is a separate and distinct contract from that of any other said local union;

(2) That the employees were as of said date, thirteen (13) days prior to the hearing, operating under said new, separate and distinct contracts. (R. 156-157.)

It was also contended by defendants that if as petitioner appellant alleges in its complaint a labor dispute existed (R. 12) then the Court had no jurisdiction to issue an injunction by reason of the Norris-La Guardia Act, *47 Stats. 70, 29 USCA Secs. 101-115.* (R. 145, 148.)

ARGUMENT.

THE DISTRICT COURT HAS NO JURISDICTION TO DETERMINE THE CONTROVERSY UNDER THE DECLARATORY JUDGMENT ACT OR ANY OTHER ACT AND THE DISTRICT COURT DID NOT ERR IN GRANTING THE MOTION TO DISMISS FILED BY THE NATIONAL LABOR RELATIONS BOARD.

Under the provisions of the National Labor Management Relations Act, 1947, it is an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer, provided it is a representative of his employees subject to the provision of section 9 (a)." NLMRA 1947, Sec. 8 (b) (3); 29 USCA, 158 (b) (3).

Section 9(a) provides:

> "(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *"

Section 9(b) provides:

> "(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees

vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards."

We therefore find that before any order could be issued by the National Labor Relations Board that the Board must determine what the "appropriate unit" is.

But under Section 9(g):

"* * * No labor organization shall be eligible for certification under this section as the representative of any employees * * * unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection."

the complaint is silent as to whether or not the defendant council or unions have complied as required by law.

This, of course, is in addition to the fact that the National Labor Relations Board must also decide whether a "labor dispute" within the meaning of the Act (NLMRA Sec. 2 (9), 29 USCA 152 (9)), between the employer and his employees would "affect commerce" within the meaning of the Act (NLMRA Sec. 2 (7) 29 USCA 152 (7)).

Now insofar as Congress has given the National Labor Relations Board the jurisdiction to pass upon the existence or non-existence of the above facts, i.e. (a) appropriateness of the unit, (b) compliance by the union or Council, (c) whether a labor dispute between the employer and his employees would affect commerce within the meaning of the Act, the Board's power is exclusive.

Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893;

Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 82 L. Ed. 639;

Newport News Shipbuilding & Drydock Co. v. Schauffler, 303 U.S. 54, 82 L. Ed. 646.

In the case of *Gerry of California v. Superior Court in and for Los Angeles County* (Cal. June 16, 1948), 194 P. (2d) 689, 32 Cal. (2d) 119, Justice Shenk reviewed fully the decisions of both state and federal Courts under the Labor Management Relations Act of 1947, and the following is quoted from his opinion, beginning on page 122:

> "At the hearing the plaintiff agreed that the activities sought to be enjoined were peaceful and that there was no state law pursuant to which the

company could obtain equitable redress. The petitioner invokes sections 8(b) and 303 of the Labor Management Relations Act, 1947, as furnishing the law pursuant to which the respondent court must exercise the equity jurisdiction conferred by section 5 of Article VI of the state Constitution.

"For present purposes it will be sufficient, without setting out the specific provisions, to note that section 8(b) of the 1947 Act declares it to be an unfair labor practice affecting interstate commerce for a labor organization to engage in the concerted activities specified in the record. Accordingly it is assumed that the alleged activities on the part of the uncertified unions are unfair labor practices as designated by that section. Section 303(a) declares the same practices unlawful 'for the purposes of this section only.' Subsection (b) states: 'Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States * * * or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.'

"(3-6) It is the petitioner's argument that the state Courts have concurrent jurisdiction with the federal Courts to enforce rights created by a federal statute. Inasmuch as the laws of the United States are as binding on citizens and Courts as state laws, state Courts competent to exercise it have concurrent jurisdiction with the federal Courts to enforce federal law unless expressly or by necessary implication withheld by federal statute, and the existence of jurisdiction

creates the duty to exercise it. Martin v. Hunter's Lessee, 1816, 14 U.S. 304, 4 L.Ed. 97; Claflin v. Houseman, 1876, 93 U.S. 130, 23 L.Ed. 833; Second Employers' Liability Cases, (Mondou v. New York, N. Y. & H. R. Co., 223 U.S. 1, 32 S. Ct. 169, 56 L.Ed. 327, 38 L.R.A., N.S., 44; McKnett v. St. Louis & S.F.R. Co., 292 U.S. 230, 54 S. Ct. 690, 78 L.Ed. 1227. In Bethlehem Steel Co. v. New York State Labor Relations Board, April, 1947, 330 S. Ct. 767, 67 S. Ct. 1026, 1029, 91 L.Ed. 1234, it was recognized as a settled rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of that result be wanting citing Napier v. Atlantic Coast Line R. Co. 272 U.S. 605, 47 S. Ct. 207, 71 L.Ed. 432. At the same time the Supreme Court also pointed out that Congress had not seen fit to lay down even a general guide to the construction of the National Labor Relations Act as it sometimes does (referring to the Securities Act of 1933, §18, 48 Stat. 85, 15 U.S.C.A. §77r; Securities Exchange Act of 1934, §28, 48 Stat. 903, 15 U.S.C.A. § 78bb; United States Warehouse Act, § 29, 39 Stat. 490, 46 Stat. 1465, 7 U.S.C.A. § 269) by saying that its regulation either shall or shall not exclude state action. This Court has also recognized that when the question is whether a state Court may take jurisdiction of matters arising under a federal law inquiry is first directed to the intention of Congress in that regard. Miller v. Municipal Court, supra, 22 Cal. (2d) 818, 836, 142 P. (2d) 297. Therefore, whether concurrent state jurisdiction exists is a matter to be determined from a construction of the act itself.

"A proper conclusion depends in part upon the construction of the act before the 1947 amendments. Pursuant to section 10 of the National Labor Relations Act, 29 U.S.C.A. § 160, the National Labor Relations Board was empowered, upon issuing a complaint and notice, to conduct a hearing on a charge of employer unfair labor practices defined in the act and to issue a cease and desist order, together with orders for affirmative relief. Such orders were enforced by petition to the Circuit Court of Appeals which was empowered to conduct a hearing and render a decree (including temporary injunctive relief) enforcing, modifying and enforcing, or setting aside the order of the board. For the purposes of section 10, the limitations imposed by the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C.A. §§ 101-115, upon the issuance of restraining orders and injunctions in cases involving labor disputes were removed.

"By section 10 (a) before amendment the power thus reposed in the National Labor Relations Board was made 'exclusive' and not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise'. In Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 264, 60 S. Ct. 561, 563, 84 L. Ed. 738, the Supreme Court said, with reference to providing the remedy for the specified unfair labor practices: 'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be

made effective.' The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized. That section 10 of the National Labor Relations Act committed to the board the exclusive power to decide whether unfair labor practices by the employer had been engaged in and to determine the action that should be taken to remove or avoid the consequences thereof was again stated in National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, at page 365, 60 S. Ct. 569, at page 577, 84 L. Ed. 799. Also, National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 46, 47, 57 S. Ct. 615, 81 L. Ed. 893, 108 A.L.R. 1352, and Myers v. Bethlehem Shipbuiding Corporation, 303 U.S. 41, 48-50, 58 S. Ct. 459, 82 L. Ed. 638, upheld as constitutional the vesting of the exclusive power in the board. The most recent pronouncement of the Supreme Court to come to our attention is in Bethlehem Steel Co. v. New York State Labor Relations Board, supra, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234, reversing 295 N.Y. 601 and 607, 64 N.E. (2d) 350, wherein it was held that state and federal action covering the subject

matter of the National Labor Relations Act would not co-exist. Similarly in Blankenship v. Kurfman, 1938, 7 Cir., 96 F. (2d) 450, 454, it was held that the National Labor Relations Act might not be construed as intending to create rights for employees which could be enforced in federal Courts independently of action by the National Labor Relations Board; that it was clear that the only rights which were made enforceable by the Act were those which had been determined by the board to exist under the facts of each case, and that when determined the method of enforcing them provided by the Act must be followed. In Fur Workers Union, Local 72 v. Fur Workers Union, 70 App. D. C. 122, 105 F. (2d) 1, with reliance on the Blankenship case, such double jurisdiction was likewise held to be contrary to the intent manifested by the provisions of the National Labor Relations Act. See also Styles v. Local 74, D. C. 74 F. Supp. 499.

"The Supreme Court of the United States has also recognized the application of the 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted'—referring to the application to the National Labor Relations Board for determination of the factual issues and the appropriate relief designated in the National Labor Relations Act. Myers v. Bethlehem Corporation, supra, 303 U. S. at pages 50, 51, citing numerous cases; see also, Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U. S. 54, 58

S. Ct. 466, 82 L. Ed. 646; United Brick & Clay Workers v. Junction City Clay Co., 6 Cir., 158 F. 2d 552; Steinberg v. Lebus, D. C., 71 F. Supp. 121, 124."

* * * * * * *

"As noted, the National Labor Relations Act before its amendment by the 1947 Act did not define or place within the scope of the National Labor Relations Board's jurisdiction unfair labor practices on the part of labor organizations. By section 8 (b) of the 1947 Act the conduct charged to the defendant unions in this case is declared to be unfair labor practices.

"Prior to the 1947 amendment the powers of the board under section 10 of the act were limited to the issuance of cease and desist orders against employers, after investigation and hearing, and the enforcement thereof by petition to the Circuit Court of Appeals for injunction and other process. Concurrently with the inclusion by the 1947 Act of declared unfair labor practices by labor organizations (section 8 (b), Congress deemed it expedient to provide accelerated means for obtaining injunctive orders. Under the 1947 Act a temporary restraining order may be obtained after the issuance *of a complaint by the board as to any unfair labor practice,* by petition filed in the United States District Court, upon notice and hearing (sec. 10(j)). In certain cases of unfair labor practices by labor organizations designated in section 8(b), the duty to apply for temporary injunctive relief is mandatory whenever preliminary investigation by the board indicates reasonable cause for belief that the charge is true (sec. 10(1)). Section 10(h) removes the restrictions

and limitations upon the equity jurisdiction of United States Courts imposed by the Norris-LaGuardia Act insofar as action by the National Labor Relations Board is concerned. See Bakery Sales Drivers Local Union No. 33 v. Wagshal, March 15, 1948, 333 U.S. 437, 68 S. Ct. 630.

"The provision of section 303(a) of the 1947 Act restricting the unlawfulness there declared to the purposes of that section discloses an intent not to authorize criminal prosecutions for the commission of the specified unfair labor practices by labor organizations. The section then permits suits in district courts of the United States and other courts having jurisdiction of the parties for the recovery of damages occurring from the 'unlawful' acts on the part of labor organizations. This is the only jurisdiction over suits by private parties which is expressly recognized by the act. In designating the nature of the board's power in section 10(a) of the 1947 Act, Congress omitted the word 'exclusive' from the National Relations Act. The petitioner argues that the omission implies an intent to permit injunctive relief as well as damages at the suit of parties injured by the designated unfair labor practices committed by labor organizations. But in amending that section to eliminate the word 'exclusive,' Congress also added a proviso empowering the National Labor Relations Board by agreement to cede to state agencies jurisdiction in any industry (with certain exceptions) although a labor dispute affecting interstate commerce was involved, where the local regulatory provisions were consistent with the federal act. The word 'exclusive' would be inconsistent with the exercise

of ceded power by agencies created pursuant to the state regulatory legislation invited by the proviso.

"(8) The provisions of the 1947 Act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. This intent is also indicated by the record of the conference and committee reports and congressional debates.

"The pertinent portions of those reports and debates were reviewed by the Fourth Circuit Court of Appeals in Amazon Cotton Mill Co. v. Textile Workers Union of America, 167 F. (2d) 183, 188. The appeal in that case involved the jurisdiction of the federal district court under the National Labor Relations Act as amended by the 1947 Act to issue an injunctive order at the suit of a labor organization. A mandatory injunction theretofore issued by the District Court required the employer to bargain collectively with a union of its employees. It was concluded that the history of the National Labor Relations Act and the decisions rendered thereunder made it clear that the purpose of the act was to establish a single paramount administrative authority in connection with the development of federal law regarding collective bargaining; that the only rights made enforceable were those determined by the National Labor Relations Board to exist under the facts of each case; that there was nothing in the text or the history of the enactment of

the 1947 Act which indicated a departure from the foregoing purposes or policies, or showed any intention to vest jurisdiction in the courts except to the limited extent that jurisdiction was expressly conferred; that only under section 303 was jurisdiction given to entertain actions brought by private parties and then only to render judgments for damages arising out of jurisdictional strikes and boycotts. That court also reached the conclusion from a study of the new act and the conference reports that the purpose of omitting the word 'exclusive' from section 10(a) of the National Labor Relations Act was merely to synchronize with the power reposed in the board the added elements of jurisdiction expressly vested in the courts and which may be ceded to state agencies under the 1947 proviso of said section. The court said: 'There is nothing in the history of the act, the reports of committees or the debates in Congress which even vaguely supports the contention that its effect was to vest jurisdiction in the District Courts to grant relief against unfair labor practices. Everything said by anyone remotely bearing on the matter is to the contrary. * * * It is hardly thinkable that, if the effect of the Labor Management Relations Act was to make a fundamental change in the jurisdiction to deal with unfair labor practices, this important fact would not have dawned upon some member of the House or the Senate and have been referred to in the course of the lengthy debate of a measure that was passed over a Presidential veto. That no such suggestion was made gives ample support to the interpretation which, as we have already indicated, we would

place upon the text of the act if the history of its passage and Congressional debates were not available to us.' The court mentioned cases in trial courts where injunctive relief had been denied (Douds v. Wine, Liquor & Distillery Workers Union, D.C., 75 F. Supp. 477; Fitzgerald v. Douds, D.C., 76 F. Supp. 597, Southern District of New York; and the present case), and referred to the disastrous consequences to any successful administration of the labor law, and the repugnance to the orderly administration of justice, if courts should take coordinate jurisdiction with the National Labor Relations Board to restrain unfair labor practices. The court also noted the absurdity which would result from unauthorized court actions at the suit of labor organizations, since Congress clearly intended to withhold redress on a charge of unfair labor practices made by a labor organization unless the latter had filed certain financial statements and affidavits (sec. 9(f), (g), (h)). Not overlooked was the possibility that unusual cases might arise where courts of equity could be called upon to protect the rights created by the act. But the court recognized that the case involved nothing out of the ordinary, that the procedure before the board provided an adequate administrative remedy, and that the extraordinary powers of a court of equity could not be invoked until the administrative remedy had been exhausted, citing Newport News Shipbuilding v. Dry Dock Co. v. Schauffler, 4 Cir., 91 F. (2d) 730, affirmed supra, 303 U.S. 54, 58 S. Ct. 466, 82 L. Ed. 646. No question is here presented as to what the situation would be if the petitioner had exhausted its administrative remedy.

"(9) The reasons for concluding that express jurisdiction was not conferred on federal trial courts at the suit of a private party to restrain alleged unfair labor practices, as held in the Amazon Cotton Mill Co. case, likewise compel the conclusion that the nature and purpose of the act preclude state action in the field of the jurisdiction vested in the National Labor Relations Board except to the extent that it has been expressly conferred or ceded, and that this is so whether such action be initiated by an employer or by a labor organization. General language in Park & Tilford Import Corporation v. International, etc., of Teamsters, supra, 27 Cal. (2d) at page 604 et seq., 165 P. (2d) at page 894, and Lillefloren v. Superior Court, 31 Cal. (2d) ....., ..., 189 P. (2d) 265, indicating that the state courts might enjoin union activities affecting interstate commerce if engaged in for an unlawful purpose is not controlling here. It is necessarily restricted to the period prior to the effective date of the 1947 Act when no administrative remedy was afforded to prevent unfair labor practices on the part of labor organizations."

See also

Keller v. American Cyanamid Company, New Jersey, Chancery Court (1942), 6 Labor Cases 63630;

Manning v. Feidelson, 175 Tenn. 576, 136 S.W. (2d) 510;

Fidelity Union Trust Company v. Ackerman, 121 N.J. Eq. 497, 191 Atl. 813;

Oliver v. Local or Subordinate Lodge No. 656 (Tenn. 1944), 185 S.W. (2d) 525, 9 Labor Cases 67044;

Fedor Tepco Employees' Union v. The Enamel Products Co. (Ohio 1940), 2 Labor Cases 1008;

Sanco Piece Dye Works v. Herrick, 33 Fed. Supp. 80.

The case of *Manning v. Feidelson,* 175 Tenn. 576, 136 S.W. (2d) 510, is directly in point, and Judge McKinney, delivering the opinion of the Court said:

> "This Labor Board is a Federal agency created for the purpose of regulating commerce between the states. This is an exclusive power vested in Congress by the Constitution, and the states may not regulate such commerce in any manner. U.S. Const., Art. I, sec. 8, cl. 3, 12 C.J. 12; *Hannibal & St. Joseph R. Co. v. Hudson,* 95 U.S. 465, 469, 24 L. Ed. 527; *Crutcher v. Commonwealth of Kentucky,* 141 U.S., 47, 59, 60, 11 S. Ct. 851, 35 L. Ed., 649; *Brennan v. City of Titusville,* 153 U.S., 289, 301, 14 S. Ct., 829, 38 L. Ed., 719. It seems to us that the purpose of this Act is the same as that of the Interstate Commerce Act, 49 U.S.C.A., section 1 *et seq.,* both being created for the purpose of regulating interstate commerce."

In addition to the foregoing cases it was said in the case of *Montgomery Ward Employees Ass'n v. Retail Clerks International Protective Ass'n,* 38 Fed. Supp. 321-322:

> "If this court were to inject itself into the present controversy, it would seize powers of the National Labor Relations Board. If plaintiff organization won the right to prevent picketing or any otherwise lawful activities of a labor organization

by reason of the filing of the petition, the Court in granting those rights to such organization must accept the contention that it represents some, if not a majority of the Company's employees. It is in fact asked to enjoin these organizations from attempting to bargain with the employer although the unions are so entitled unless and until it is found they do not represent a majority of the employees. Yet it is the Board, not the Court which must determine this question. The very issue which the Board resolves is the matter of representation. The Court is not empowered to determine it."

It has been held in the following cases that both federal and state decisions establish the rule that the National Labor Relations Act confers "exclusive initial jurisdiction upon the Board" to determine the facts upon the existence of which depends the duty of the employer to bargain collectively with the union as the representative of all the employees and the right of a union to bind all the employees to a union shop contract.

Stone Logging & Contracting Co. v. International Woodworkers of America, 135 Pac. (2d) 759 (Oregon);

Montgomery Ward Employees Ass'n v. Retail Clerks International Protective Ass'n, 38 Fed. Supp. 321-322;

Cleveland CC & St. L. Ry. Co. v. U. S., 275 U.S. 404, 72 L. Ed. 338;

Hill v. State of Florida ex rel. Watson, 325 U.S. 538, 89 L. Ed. .....

In the case of *United Brick and Clay Workers of America v. Junction City Clay Company* (6 C.C.A.), 158 Fed. (2d) 552, an action was brought by the United Brick and Clay Workers of America against the Junction City Clay Company and others for an injunction ordering the defendants to cease from further acts in furtherance of alleged violation of the National Labor Relations Act. This action was commenced in the District Court for the Southern District of Ohio and from a judgment dismissing the action the plaintiff appealed. The Circuit Court of Appeals, in passing on the action of the District Court in dismissing the petition for injunction said:

> "We think the order of the District Court dismissing the petition is clearly correct for two reasons, either of which compels affirmance of the order. Violations of the National Labor Relations Act *lie within the exclusive jurisdiction* of the National Labor Relations Board, under Sec. 10 (a) of the Act, and hence the District Court has no jurisdiction of the subject-matter of the action. Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54, 58 S. Ct. 466, 82 L. Ed. 646; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 48, 50, 58 S. Ct. 459, 82 L. Ed. 638.
>
> "The petition does not state a cause of action. The appellant has an adequate remedy before the National Labor Relations Board which it has failed to exhaust. Sec. 10 (a), National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., 29 U.S.C.A. Sec. 151 et seq. This is an insuperable obstacle to the maintenance of the action in this court. Myers v. Bethlehem Shipbuilding Corp.,

supra, 303 U.S. 41 at pages 50, 51, 58 S. Ct. 459, 82 L. Ed. 638; Madden v. Brotherhood and Union of Transit Employees of Baltimore, 4 Cir., 147 F. (2d) 439." (Italics ours.)

It is also apparent that the plaintiffs have not exhausted their administrative remedy.

Abelleiro v. Dist. Court of Appeals, 17 Cal. (2d) 280;

International Brotherhood of Teamsters v. International Union of United Brewery, etc., 106 Fed. (2d) 871;

Fedor v. Enamel Prod. Co., 2 Labor Cases 1008;

Keller v. American Cyanamid Company, 6 Labor Cases 63630;

Meyers v. Bethlehem Shipbuilding Corp., 303 U.S. 41-58, 86 L. Ed. 638.

An injunction will not issue except where the plaintiff has no other adequate remedy and the threatened injury is irreparable.

Kredo v. Phelps, 145 Cal. 526;

Fedor v. Enamel Prod. Co., 2 Labor Cases 1008;

Keller v. American Cyanamid Company, 6 Labor Cases 63630.

However, in addition to the cases above referred to this Court definitely decided in *International Brotherhood, etc. v. International Union, etc.,* 106 Fed. (2d) 871, that an action in the Federal Court for declaratory relief determining issues over which the National Labor Relations Board has jurisdiction is improper.

THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF NEVADA, HAD NO JURISDICTION TO ISSUE A PRELIMINARY INJUNCTION PENDENTE LITE, A LABOR DISPUTE BEING PRESENT AND THE NORRIS-LA GUARDIA ACT BEING APPLICABLE.

That a "labor dispute" exists and that the jurisdiction of the District Court is limited by the Norris-LaGuardia Act, 47 Stats. 70, 29 USCA Sec. 101, et seq., is likewise clear from *International Brotherhood, etc. v. International Union, etc.,* (supra).

Columbia River Packers Association, Inc. v. Hinton, 315 U.S. 143, 86 L. Ed. 750, 62 S. Ct. 520, has no application to the facts of the instant case. The Court in that case held that the alleged "union" was not a labor union but an association of business men similar to petitioner appellant. There is no such allegation in petitioner's complaint (R. 2-44), in fact, the opposite appears, namely that the dispute is between employers and employees and the labor unions of which the employees are members.

Bakery Sales Drivers Union No. 33 v. Wagshal, 33 U.S. 437, 68 S. Ct. 630, 92 L. Ed. 792, does not support appellant's position that a "labor dispute" within the meaning of the Norris-LaGuardia Act, 29 USCA 101, et seq., is not set out in appellant's petition.

The portion of the opinion quoted by appellant (App. Br. 12) should not be taken from its contents. The full quotation is as follows:

> "The controversy over the hour of delivery. The petitioners claim that this was a dispute 'concerning terms or conditions of (the driver's employment)' thereby raising a labor dispute,

'whether or not the disputants stand in the proximate relation of employer and employee.' Section 13(c) of the Norris-LaGuardia Act. But the respondent had nothing to do with the working conditions of Hinkle's employees, individually or collectively. Her only desire was to have the bread come at an hour suitable for her business, and she had no interest in what arrangements Hinkle made to satisfy that desire rather than run the risk of losing her trade—to have the bread delivered by the same driver at a different hour, or by another driver, by an independent contractor, or through some other resourceful contrivance. To hold that under such circumstances a failure of two businessmen to come to terms created a labor dispute merely because what one of them sought might have affected the work of a particular employee of the other, would be to turn almost every controversy between sellers and buyers over price, quantity, equality, delivery, payment, credit, or any other business transaction into a 'labor dispute.' CF. Columbia River Packers Asso. v. Hinton, 315 U.S. 143, 86 L. Ed. 750, 62 S. Ct. 520. Furthermore, on the basis of what we have before us, respondent's disagreement with Hinkle over the delivery hour was a dead controversy, not involved in the subsequent dispute with the union, or in the boycott against which the injunction was directed."

Appellant states:

"The Norris-LaGuardia Act would be applicable if, and only if, appellant is engaged in, or affecting interstate commerce. The court ex necessitate assumed that very issue to arrive at its decision." (App. Br. 13.)

The Norris-LaGuardia Act is not so limited.

The question of whether or not a labor dispute does or does not affect commerce is not a condition precedent to the applicability of the Norris-LaGuardia Act. (29 USCA 101, et seq.)

In *Bakery Sales Drivers Union No. 33 v. Wagshal* (supra), the Court says:

> "The short answer to the argument that the Labor Management Relations Act of (June 23) 1947, PL 101, 80th Cong. 1st Sess. § 10(h), 61 Stat. 136, 146, c 120, 29 USCA § 160(h), has removed the limitations of the Norris-LaGuardia Act upon the power to issue injunctions against what are known as secondary boycotts, is that the law has been changed only where an injunction is sought by the National Labor Relations Board, not where proceedings are instituted by a private party."

The case of *United States v. United Mine Workers,* 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677, has no application here. The defendants complied with the temporary restraining order until the District Court had an opportunity to determine its own jurisdiction. The United Mine Workers did not.

Appellants state:

> "Even if it be assumed that a 'labor dispute' existed within the defined meaning of the Norris-LaGuardia Act, the District Court, upon making necessary findings of fact, could have granted an injunction. 29 U.S.C.A., Sec. 107." (App. Br. 14.)

There are no allegations in the complaint (R. 2 et seq.) that:

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." 29 U.S.C.A. 107.

There was no testimony regarding any of the above offered by the appellant and consequently unless the Court was ready and willing to itself violate the act and its oath no such findings could be made. (29 U.S.C.A. 107.)

We submit the District Court in the instant case would not so stultify its honor, and suggest that the statement by the appellants was made without any real understanding of its implication or of the provisions of the Norris-LaGuardia Act.

Appellant states:

> "Appellant's theory herein has been, and now is, that there existed no 'labor dispute' and, therefore, the Norris-LaGuardia Act was inapplicable." (App. Br. 15.)

But appellant alleges in his complaint:

> "* * * that your petitioner is informed and believes and therefore alleges the fact to be *that the position of respondents* whereby they have contended throughout their negotiations *that they are not covered by said Labor Management Relations Act of 1947 is not in good faith, but is a subterfuge for the purpose of coercing the petitioner into complying with the original demands for an amendment* to said agreement under the master agreement, *particularly in regard to wages* for the reason that throughout the entire negotiations aforesaid respondents have made the same wage demands, and *it is therefore the belief of your petitioner that said collective bargaining has not been in good faith on the part of respondents, and is merely a subterfuge to compel the petitioner and its members to meet such increased wage demands* or to be subjected to economic coercion by reason of (10) strikes, slow downs and other tactics normally employed by such unions under such circumstances." (R. 11-12.) (Italics ours.)

This portion appellant refused to strike from its complaint. (R. 171.)

That a labor dispute regarding wages existed, is a fact. No Court is going to close its eyes to the facts

in order to support a theory which must fail once the facts are known. Such, however, is the request of appellant here.

THE APPEAL SHOULD BE DISMISSED BECAUSE THE GROUNDS UPON WHICH IT IS FOUNDED ARE NOW MOOT. NO ACTUAL CONTROVERSY EXISTS AND THE COMPLAINT DOES NOT ALLEGE AN ACTUAL CONTROVERSY.

Respondents, with the exception of the respondent Local Union of Operating Engineers No. 3, filed motion to dismiss the complaint upon the above stated grounds. See Transcript of Record, pp. 155 to 157, both inclusive.

It will be noted that attached to the motion was the affidavit of the Secretary of the Building Trades Council of Reno wherein, under oath, he states among other things:

> "None of the said Unions, individually or as a group, are employed under or by virtue of the terms of said contract, and no members of any of said Unions are being paid or employed by reason and by virtue of said contract; that both employers and employees have cancelled said contract and that the said contract, by its own terms and by reason of notices given, has been cancelled or is terminated." (R. 157.)

No further or other affidavits are contained in the Transcript of Record, particularly in opposition to the affidavit from which the above quotation is taken.

During the argument of September 16, 1948, wherein the motion of respondents was presented to

the Honorable District Court, the motion to dismiss on the grounds that the question was moot was referred to several times, but no decision was rendered by the lower Court. (R. 166, 169, 175-178.) Also counsel for the appellant admitted the correctness of the affidavit. (R. 168, 169). Also statement of Mr. Griswold (R. 175-178) wherein, among other things, it was stated, and not denied, as follows, p. 177:

> "Now the complaint itself, may it please the Court, states that the contract which is the basis of the complaint was discontinued on May 21st and would be discontinued unless your Honor had restrained it, and then the complaint says that these people, the unions, are the proper parties to bargain on wages and hours."

The record shows that the complaint on file in this action prays for an advisory opinion only and for legal advice on a contract that not only expired by its own terms but has also terminated by the acts of the parties.

The record shows that there are no issues to be determined or settled between the parties hereto for the reason that the contract alleged in the complaint filed herein has by its own terms expired and by the acts of the parties has been cancelled, and new contracts entered into by the parties. Therefore, any decision in this case would settle nothing as there is no actual or existing controversy between the parties arising from the contract.

The question of mootness and the lack of a justiciable controversy may be considered at any time. The

Supreme Court in the recent case of *Oklahoma v. U. S. Civil Service Commission,* 330 U.S. 127, 91 L. Ed. 794, said that such an objection questions the judicial power to act and may be raised for the first time in that Court. The following is quoted from the opinion of the Court:

> "* * *, if the contention is treated as meaning that no justiciable controversy as to the constitutionality of Sec. 12(a) exists because petitioner suffers no injury which it may protect legally from the withdrawal by the U.S. of a portion of a grant in aid, the objection, as it questions *judicial power to act on this point,* is timely although first made in this Court." (Italics supplied.)

The rule that where an existing controversy has come to an end, either by an act of the parties, or by operation of law, the case becomes moot and should be dismissed, is well established by a long line of decisions of the United States Supreme Court. These decisions are collected and cited in the case of *The Aussa,* 52 Fed. Supp. 927, wherein on page 930 the Court said:

> "It is well established that where, as here, the existing controversy has come to an end, *either by an act of the parties or by operation of law, the case becomes moot and should be dismissed.* Duke Power Co. v. Greenwood County, 299 U. S. 259, 267; 57 S. Ct. 202; 81 L. Ed. 178; U. S. v. Anchor Coal Co., 279 U. S. 812; 49 S. Ct. 262; 73 L. Ed. 971; Brownlow v. Schwartz, 261 U. S. 216, 217; 43 S. Ct. 263; 67 L. Ed. 620; Hertmueller v. Stokes, 256 U. S. 359, 361; 41 S. Ct. 522; 65 L. Ed. 990; U. S. v. Alaska S. S. Co., 253 U. S.

113, 116; 40 S. Ct. 448, 64 L. Ed. 808; U. S. v. Hamburg-Americanishe, etc., Co., 239 U. S. 466, 475; 36 S. Ct. 212; 60 L. Ed. 387; Cover v. Schwartz, 2 Cir., 133 Fed. 2 541, 546; Spreckels Sugar Co. v. Wickard, 75 U. S. App. D. C. 44, 131 Fed. 2d 12, 14; Otis v. International Mercantile Marine Co., 9 Cir., 95 Fed. 2d 539, 541."

In the case of *Walling v. Shenandoah-Dives Mining Co.* (CCA Colorado) 134 Fed. (2d) 395, 396, the Court said:

> "When in course of a trial the matter in controversy comes to an end, either by an act of one or both of the parties, or by operation of law, the question becomes 'moot'."

In distinguishing between cases involving actual controversies and those calling for an advisory decree upon a hypothetical statement of facts the Supreme Court in the case of *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 80 L. Ed. 688, said:

> "The act of June 14, 1934, providing for declaratory judgments does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to 'cases of actual controversy', a phrase which must be taken to connote a controversy of justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See Nashville, C. & St. L. R. Co. v. Wallace, 288 U. S. 249, 77 L. Ed. 730, 53 S. Ct. 345, 87 A. L. R. 1191, supra."

Petition for rehearing was denied March 2, 1936, 80 L. Ed. 1011.

In the case of *Keely v. Ophir Hill Consol. Mining Co., et al.* (CCA 8th), 169 Fed. 601, a motion to dismiss the appeal on the ground that the question had become "moot" was sustained in a well considered opinion. The Court held that it may take knowledge of facts appearing *aliunde* the record which discloses the moot character of a question presented to it and decline to enter upon its consideration. In considering the procedure to be followed when it had been made to appear that the question involved had become moot, the Court said:

> "Nevertheless it is certain that the only issue now before us has been actually and finally adjudicated by a court of competent jurisdiction. The present record and the record in the action at law which has just been before us conclusively show this. *Must we shut our eyes to these obvious facts and sagely proceed to an idle and bootless investigation and to a determination of a mere moot question?* The forms of a judicial procedure are not so unyielding as to require us to do this vain thing. In the case of Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, the Supreme Court passed upon a motion to dismiss an appeal because no actual controversy existed. It there said:
>
> > "'*The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.*'

"To the same effect are Washington Market Co. v. District of Columbia, 137 U. S. 62, 11 Sup. Ct. 4, 34 L. Ed. 572; Kimball v. Kimball, 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932; Tennessee v. Condon, 189 U. S. 64, 23 Sup. Ct. 579, 47 L. Ed. 709; In re James Lincoln, 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984; Faucher v. Grass, 60 Iowa 505, 15 N. W. 302; Board of Freeholders v. Board of Freeholders, 44 N. J. Law 438; Blythe Estate, 102 Cal. 350, 37 Pac. 392.

"The court may take knowledge of facts appearing aliunde the record which disclose the moot character of a question presented to it and decline to enter upon its consideration. Cleveland v. Chamberlain, 1 Black 419, 17 L. Ed. 93; Lord v. Veazie, 8 How. 251, 254, 12 L. Ed. 1067; Wood-Paper Co. v. Heft, 8 Wall. 333; 336, 19 L. Ed. 379; Dakota County v. Glidden, 113 U. S. 222, 5 Sup. Ct. 428, 28 L. Ed. 981; Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713; Kimball v. Kimball and In re James Lincoln, supra." (Italics supplied.)

In the last mentioned case the Court in support of its decision quoted the following from the case of *Kimball v. Kimball,* 174 U. S. 158, 19 Sup. Ct. 639, 43 L. Ed. 932:

"From the necessity of the case, this court is compelled, as all other courts are, to allow facts which affect its rights and its duty to proceed in the exercise of its appellate jurisdiction, but which do not appear upon the record before it, to be proved by extrinsic evidence."

The case of *In re James Lincoln,* 202 U. S. 178, 26 Sup. Ct. 602, 50 L. Ed. 984, was also quoted from,

wherein the Supreme Court, after adverting to several other cases said:

> "In each of which, intermediate the ruling below and the time for decision here, events had happened which prevented the granting of the relief sought, and the appeals or writs of error were dismissed on the ground that this court did not spend its time deciding a moot case."

The case of *Morris Plan Bank of Ft. Worth v. Ogden* (Texas), 144 S. W. (2d) 998, is very much in point. In that case the relief sought was the cancellation of a lease which had already been cancelled, where in the case now before this Honorable Court the relief sought is an advisory opinion on a contract which has already been terminated by its own terms and by the acts of the parties. On page 1004 the Court said:

> "A case is said to be a 'moot case' when the question to be determined is 'abstract'. The case is clearly a 'moot case' when the sole relief sought is the cancellation of a lease which already has been cancelled."

In *Diedricksen v. Sutch* (Cal.), 118 Pac. (2d) 863, the Court said:

> "Questions involved in an appeal may become moot by reason of the acts of the legislature, *of the parties,* or by lapse of time." (Italics supplied.)

In *Chicago City Bank & Trust Co. v. Board of Education of City of Chicago,* 54 N. E. (2d) 498, 503, 386 Ill. 508, it was held:

> "A question is 'moot', requiring dismissal of appeal, when it involves no actual controversy, interests, or rights of parties, or when issues have ceased to exist."

In the case of *McDonald v. Brewery & Beverage Drivers & Helpers and Warehousemen Local Union No. 792,* 9 N. W. (2d) 770, 772, 215 Minn. 274, it was held that the termination of a contract caused the question of breach of the contract to become a moot question.

In the case of *Walling v. Lacy,* D. C. Colo., 51 Fed. Supp. 1002, it was held.

> "Where, in the course of proceedings in a litigated matter, the controversy between the parties has come to an end *by the act of either,* the question is 'moot'."

The case of *Mountain States Beet Growers Marketing Association v. Wagner* (Colorado 1926), 247 Pac. 804, is another case which is very much in point. In this case plaintiff brought suit in March, 1925, to annul his contract (a co-operative marketing contract) and enjoin its enforcement for that year. The contract between the association and grower was unlimited as to time, but contained a provision that either party might cancel it by written notice given on or before November 1 of any year. The Court found the contract void but did not expressly cancel it. A decree was ordered on March 31 and entered May 5, 1925, enjoining its enforcement for the year 1925. The appellate court in its opinion said:

"The cause did not reach an issue here until December 27, 1925. It was orally argued and reversed. A re-hearing was granted, additional briefs filed, and it was again orally argued. Not until final consideration did it appear to the court, as now seems certain, *that the cause is moot.* Neither side suggested the point; otherwise the writ would have been dismissed in the first instance." (Italics supplied.)

In the same case it was further said:

"The season of 1925 had passed before this cause reached us. There was neither contract nor crop for that year upon which a judgment could operate. When no judgment rendered can be carried into effect, the cause is moot and the courts will not consider it. Mills v. Green, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; Keely v. Ophir Hill, 169 Fed. 601, 605; Nail v. McCullough, 88 Okla. 243, 212 Pac. 981."

In *New Discoveries v. Wisconsin Aluminum Research Foundation,* 13 Fed. Supp. 596, on page 598, the Court said:

"The insertion of the word 'actual' in the statute means that the court is to deal with realities, and not with an imaginary set of facts * * * The dispute between the parties, if any, is purely academic, and based upon a purely hypothetical statement of facts that are contingent, uncertain, and may never exist."

On page 599 it is further stated:

"The court should not be asked to decide moot cases, give legal advice, or render an advisory opinion. The declaratory judgment statute was not enacted for that purpose."

In *Aetna Cas. & Sur. Co. v. Quarles,* CCA (S. C. 1937), 92 Fed. (2d) 321, it was held: A declaratory judgment should be denied when another Court has jurisdiction of issue, where proceeding involving identical issues is already pending in another tribunal, *where special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances.*

In *Chicago Furniture Forwarding Co. v. Bowles* (CCA Ill. 1947), 161 Fed. (2d) 411, it was held that the District Court in dismissing action for declaratory relief is a proper exercise of discretion when it is apparent that it would serve no useful purpose.

In *Doehler Metal Furniture Co. v. Warren* (App. D. C. 1942), 129 Fed. (2d) 43, it was held that the District Court has discretion to dismiss action for declaratory judgment where it feels that not enough can be settled by the action.

In the case of *Imperial Irrigation District v. Nevada-California Electric Corp.* (CCA 9), 111 Fed (2d) 319, the parties entered into a stipulation that any judgment rendered in this case for declaratory relief would not be *res judicata* and the Court in holding that a decision could not be rendered on a moot question said:

> "This stipulation specifically provides that any judgment thereon shall not be res judicata, and undertakes to request an opinion of the court upon a hypothetical question. The parties ask the court to assume and act upon the assumption that the plaintiff has title to the property involved, at the same time stipulating that no one is to be bound by the assumption."

The case of *Ashwander v. Tennessee Valley Authority* was cited and quoted from in support of the decision in this case.

In the case of *State v. Jones* (Wyo.), 157 Pac. (2d) 993, the Court in considering the question of what the courts regard as a moot case, examined and cited with approval several cases which are quoted from its opinion:

> "What do the courts regard as a moot case? As regards the matter at bar the concise statement of the Supreme Court of Colorado, in Mountain States Beet Growers' Marketing Ass'n. v. Wagner, 79 Colo. 604, 247 P. 804, would appear to supply as good a definition as could be framed. In that case the court said: 'When no judgment rendered can be carried into effect, the cause is moot, and the courts will not consider it. Mills v. Green, 159 U. S. 651, 16 S. Ct. 132, 40 L. Ed. 293; Keely v. Ophir Hill, 9 Cir., 169 F. 601, 605, 95 C. C. A. (96), 99; Nail v. McCullough (& Lee), 88 Okl. 243, 212 P. 981.'
>
> "Citing an extended list of decisions the Court of Appeals of Kentucky, in Hudspeth v. Commonwealth, 204 Ky. 606, 265 S. W. 18, more elaborately says: 'It is the universal rule that courts will not consume their time in deciding abstract propositions of law or moot cases, and have no jurisdiction to do so. A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right, before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then existing controversy. As falling within that category it is well established that

where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed.'

"To the same effect is the statement in McNeill v. Hubert, 119 Tex. 18, 23 S. W. 2d 331, 333: 'A case becomes moot when it appears that one seeks to obtain a judgment upon some pretended controversy when in reality none exists, or when he seeks judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy. City of Dallas v. Rutledge, Tex. Civ. App., 258 S. W. 534, 537; Adams v. Union R. Co., 21 R. I. 134, 42 A. 515, 517, 44 L. R. A. 273; State v. Dolley, 82 Kan. 533, 108 P. 846. Courts do not sit for the purpose of expounding the law upon abstract questions, but to determine the rights of litigants by the rendition of effective judgment. Ex parte Steele, D. C., 162 F. 694.'

"It is also indicated in Diedricksen v. Sutch, 47 Cal. App. 2d 646, 118 P. 2d 863, 865, that: 'Questions involved in an appeal may become moot by reason of the acts of the legislature, of the parties, or by lapse of time.' "

The respondents should prevail in this appeal and it should be dismissed because the grounds upon which the action is founded and this appeal is taken are now, and at the time of the hearing before the lower court on September 16, 1948, were moot. No actual controversy exists and the complaint does not allege an actual controversy. Appellant herein is asking for nothing more than an advisory opinion, no actual controversy being present, or alleged in the pleadings

which is ripe for judicial determination. The action, therefore, does not come within the purview of the Declaratory Judgment Act.

The Declaratory Judgment statute § 274(d) of the Judicial Code, 28 U.S.C.A. 400, is procedural and provides an additional remedy in cases, *only where the Federal Courts already* have jurisdiction. In *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, etc.,* 137 Fed. (2d) 176, affirmed 64 S. Ct. 1257, 322 U.S. 771, 88 L. Ed. 1596, the Court, on page 179, column 2, said:

> *"This is a procedural statute that provides an additional remedy for use in cases of which the federal courts already have jurisdiction.* * * * The courts are limited in their jurisdiction to cases of actual controversy of a justiciable nature, *thus* excluding an advisory decree." (Italics supplied.)

In the foregoing case there was an actual controversy in which both sides joined in the petition for a judicial declaration of the legal rights and legal relations of the parties. The parties agreed that if the issue as to working time should be determined against appellants, the Court should then determine whether or not the employees were entitled to recover and, if so, how much. The Court further stated:

> "A declaratory judgment is for the purpose of finally settling an actual controversy, *and ordinarily should not be entered if it will not do so."* (Italics supplied.)

On page 180, column 2, the Court said:

> *"We cannot enter advisory judgments upon hypothetical facts. The declaratory judgments*

> *procedure does not change the essential requisites for the exercise of judicial power.* The courts are limited in their jurisdiction to cases of actual controversy of a justiciable nature." (Italics supplied.)

The contract involved in the case now before this Court having expired by its own terms and also by the acts of the parties, what substantive right is available thereunder to the appellant herein? In the case of *Hargrove v. American Cent. Ins. Co.* (10 CCA), 1942, 125 Fed. (2d) 225, the Court, on page 228, column 1, in rendering its opinion on the Declaratory Judgment Act, said:

> "It affords a complete and expeditious remedy *whereby a party to a justiciable controversy may affirmatively assert any substantive right otherwise available to it in a civil action.*" (Italics supplied.)

The Declaratory Judgment Act is merely procedural, which provides *an additional remedy for use in those controversies of which the District Courts already have jurisdiction.*

> *American Chemical Paint Co. v. Dow Chemical Co.* (CCA Mich., 1947), 161 Fed. (2d) 956;
>
> *Magic Foam Sales Corp. v. Mystic Foam Corp.* (CCA Ohio, 1948), 167 Fed. (2d) 88;
>
> *Guardian Life Ins. Co. of America v. Kortz* (CCA Colo., 1945), 151 Fed. (2d) 582.

The Declaratory Judgment Act does not create new rights or increase or extend jurisdiction of courts.

> *Miles Laboratories v. Federal Trade Commission* (1944), 140 Fed. (2d) 683, 78 U.S. App.

D.C. 326, certiorari denied 64 S. Ct. 1263, 322 U.S. 752, 88 L. Ed. 1582;

Chicago Pneumatic Tool Co. v. Biegler (CCA Pa. 1945), 151 Fed. (2d) 784.

This Honorable Court in the case of *West Publishing Co. v. M. C. Colgan,* 138 Fed. (2d) 320, said, at page 324:

"The Federal Declaratory Judgment Act was not a jurisdiction-conferring statute, but an act to establish a new procedure in the federal courts, remedial in its nature. Mississippi Power & Light Co. v. City of Jackson, 5 Cir., 116 F. 2d 924, 925; Aetna Casualty & Surety Co. v. Quarles, 4 Cir., 92 F. 2d 321, 323. 'Thus the operation of the Declaratory Judgment Act is procedural only.' Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 240, 57 S. Ct. 461, 463, 81 L. Ed. 617, 108 A.L.R. 1000. As this court once said, in Southern Pacific Co. v. McAdoo, 9 Cir., 82 F. 2d 121, 122: 'The Declaratory Judgment Act (Judicial Code § 274d, 28 U.S.C.A. § 400 and note) is limited in its operation to those cases which would be within the jurisdiction of the federal courts if affirmative relief were being sought (Cases cited.) The mere fact that a declaratory judgment is sought is not, of itself, a ground of federal jurisdiction.' See, also Borchard on Declaratory Judgments, 2d Ed., p. 231, et seq., where, at p. 233, the author says, 'It is an axiom that the Declaratory Judgment Act has not enlarged the jurisdiction of the courts over subject matter and parties, although it manifestly has opened to prospective defendants—and to plaintiffs at an early stage of the controversy—a right to petition for relief not heretofore possessed.' In other words, the Federal Declaratory Judgment Act can apply

> only to a cause which the district court might otherwise be empowered to hear and determine. This is not gainsaid by appellant."

The case of *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 57 S. Ct. 461, 81 L. Ed. 617, cited by appellant does not support the position taken by appellant. In that case there was an actual controversy arising out of contracts of insurance. On page 622 of the L. Ed. citation, the Court said:

> "There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to their existing obligations. Their contentions concerned the disability benefits which were to be payable upon prescribed conditions. * * * It was a claim of a present, specific right. * * * Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.

The Supreme Court in the foregoing case in defining the term "controversy" as used in the Declaratory Judgment Act, said, quoting from page 621 of the L. Ed. citation:

> "A 'controversy in this sense must be one that is appropriate for judicial determination.' (Citing case.) 'A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is

academic or moot. U. S. v. Alaska S. S. Co., 253 U. S. 113, 116, 64 L. Ed. 808, 809, 40 S. Ct. 448. *The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.* (Citing cases.) *It must be a real and substantial controversy admitting of specific relief through a decree of a specific character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.* (Citing many Supreme Court decisions.)" (Italics supplied.)

It is clear that the complaint filed herein by appellant and as amended in the District Court alleges a "labor dispute", otherwise no dispute is alleged and there exists no actual controversy between the parties involving the legal interests and legal relationships of the parties. Any judgment rendered thereon would not adjudicate any legal right, relationship or obligation of the parties.

The Congress has provided a specific remedy for appellant and that remedy must first be exhausted. This Honorable Court in the case of *International Brotherhood, etc. v. International Union, etc.,* 106 Fed. (2d) 871, said:

"* * * Here is a violent 'controversy' in all the producing units of a wide flung industry of the exact kind the National Labor Relations Act is purposed to settle. * * *

"Since both the Employees and the Brewery Workers Union and also the Breweries have an administrative tribunal established by Congress *for the specific purpose of determining the controversy concerning the bargaining agent, the de-*

cision of that tribunal, and not the federal court first should have been sought. Myers v. Bethlehem Shipbuilding Corporation, 303 U. S. 41, 50, 58 S. Ct. 459, 82 L. Ed. 638. CF Fur Workers Union, Local No. 72, v. Fur Workers Union, No. 21238, 70 App. D. C. 122, 105 F. 2d 1, 12." (Italics supplied.)

CONCLUSION.

Respondents respectfully submit:

1. That an action for declaratory relief will not lie in the instant case;

2. That the Court in the instant case has no jurisdiction to grant an injunction *pendente lite* as requested by appellants by reason of the Norris-La Guardia Act;

3. That the action is moot.

Wherefore, respondents pray that the judgment be affirmed.

Dated, San Francisco, California,
May 16, 1949.

Respectfully submitted,

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